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Supreme Court of the United States

October Term, 1940

No. 139.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Petitioners,

vs.

ROCKWELL LIME COMPANY, et al.,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

J. N. DAVIS,
CARSON L. TAYLOR,
LOWELL HASTINGS,
P. F. GAULT,
Attorneys for Petitioners.

C. S. JEFFERSON,
WILLIAM T. FARICY,
Of Counsel.

MCCORMICK AND HENDERSON, INC., CHICAGO

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

This cause does *not* involve a conflict between the Interstate Commerce Commission and a state commission, as unfortunately is often the case. The cause is presented to this Court because the judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of Cook County collaterally and retroactively sets aside and holds for naught administrative determinations and orders entered concurrently by the Interstate Commerce Commission and the Illinois Commission under date of November 30, 1926, and applied in order of dismissal entered herein by the latter Commission under date of January 4, 1933.

The transactions alleged to be involved herein all took place many years ago, viz., during the period September 10, 1925, to February 15, 1927.

JUDGMENT FINAL WITHIN MEANING OF THE STATUTE.

Respondents' contention that the judgment is not final within the meaning of section 237 (b) of the Judicial Code, as amended, is supported neither by the record nor by the law. The judgment of the Supreme Court of Illinois (R. 238) affirms the judgment of the Circuit Court of Cook County reversing the order of the Illinois Commerce Commission dismissing the complaint (R. 202-204). The judgment of the Circuit Court of Cook County further directs that Commission to award restitution to respondents, leaving the Commission no administrative or other discretion and no opportunity to reexamine the questions presented, and this appears to be conceded by respondents (their brief p. 31).

It is true that, under the judgment herein, the Illinois Commission would have the duty of ascertaining the amount due each of respondents and to enter a reparation order accordingly, but this would be purely a ministerial function. If and when such an order were entered there could be no review thereof by appellate procedure, since the law of Illinois as construed by the Appellate and Supreme Courts of the state does not permit an appeal by a railroad of an order entered by the Commission for the payment of money. *Medusa Portland Cement Co.* v. *Ill. Cent. R. Co.*, 287 Ill. App. 549. *Terminal R. R. Assn.* v. *Utilities Com.*, 304 Ill. 312.

Section 76, chapter 111⅔, Illinois Revised Statutes, 1939, is similar in purport to section 16 (2) of the Interstate Commerce Act (49 U. S. C. sec. 16 (2)) providing for the enforcement of so-called reparation orders of the Interstate Commerce Commission. Each section provides in substance that the person for whose benefit the order was made may file in a court of competent jurisdiction a petition setting

forth briefly the causes for which damages are claimed and the order of the Commission in the premises; that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated, and that if petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action.

None of the cases cited in respondents' brief in support of their contention that the judgment sought to be reviewed herein is not a final one is relevant. They relate to actions in court and involve no proceedings or procedure before administrative bodies. In the cases cited by respondents although the decision of the Supreme Court of the state remanding the case for further proceedings may have decided certain questions of law, it was still possible for the appellant or petitioner to obtain a review by subsequent appeal. As already pointed out, petitioners herein will be denied a court review of the reparation order entered by the Illinois Commission under compulsion of the courts of that state, since the Illinois statute permits no appeal from such an order.

Illustrative of the cases cited in respondents' brief is *Louisiana Nav. Co.* v. *Oyster Commission,* 226 U. S. 99, wherein this Court dismissed a writ of error to the Supreme Court of Louisiana. The judgment of the trial court had dismissed a petition on the ground that it stated no cause of action. The Supreme Court of that state reversed the judgment of the trial court and permitted an amendment to the petition. This Court specifically pointed out that if and when a final judgment should be obtained this Court would have jurisdiction to review it and to determine all federal controversies in the cause arising during the trials or appeals before the state courts. In the instant case, petitioners repeat, it will not be possible under the law of Illinois to obtain a court review by appeal from the

Illinois Commission's order entered under mandate of the Illinois Supreme Court in this proceeding.

Respondents suggest (their brief p. 36) that, in the event an order for the payment of money should be entered by the Illinois Commerce Commission and suit brought thereon by petitioners, the trial thereof would be *de novo*. But this is not the law. A railroad resisting an order for the payment of money entered by the Interstate Commerce Commission and similarly by the Illinois Commission is confined within narrowly circumscribed limits in respect of a defense. No trial *de novo* is permitted. *Adams* v. *Mills*, 286 U. S. 397. *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 Fed. (2d) 490, certiorari denied 290 U. S. 697. *Penn Anthracite Mining Co.* v. *Delaware & H. R. Corp.*, 16 Fed. Supp. 732. *Delaware & H. R. Corp.* v. *Penn Anthracite Mining Co.*, 91 Fed. (2d) 634, certiorari denied 302 U. S. 756.

Moreover, should an order for the payment of money be entered against petitioners by *judicial fiat* of the Illinois courts they would be confronted with the possibility of being required to pay an attorney's fee (sec. 73, chap. 111⅔, Ill. Rev. Stats., 1939) in the event they should resist payment of the order. The purpose of the provision relating to attorneys' fees is to discourage contests and to promote prompt payment of Commission awards. *Baldwin* v. *Milling Co.*, 307 U. S. 478. The result is that if a reparation order be entered herein petitioners, notwithstanding the fact that both the Interstate Commerce Commission and the Illinois Commerce Commission, acting as public agencies and carrying out duties imposed by the Congress in the interest of shippers generally, *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. ...., had found respondents' cause without merit, would be denied a direct review and subjected to the coercive process of the statute.

It is apparent that the public interest would be placed in jeopardy, since, in view of the rejection of respondents' claims by the Interstate Commerce Commission and the Illinois Commerce Commission as the result of a joint hearing authorized by the Congress, payment of these claims by petitioners should not be made unless and until the questions of law are determined by this Court.

Petitioners invite the Court's attention to *Cobbledick* v. *United States,* 309 U. S. 323, wherein the question of what is a final decision or judgment was given searching scrutiny and careful consideration by this Court. The doctrine of that decision demonstrates beyond question that the judgment herein is final. This Court drew a distinction between ordinary judicial proceedings and proceedings related to an administrative agency, the latter having a finality peculiar to the procedure involved.

This Court pointed out, on page 325 of the decision in the *Cobbledick case,* that *"To be effective, judicial administration must not be leaden-footed."*

This rule applies with particular force to the case in hand, since the Interstate Commerce Commission and the Illinois Commission, the public agencies carrying out duties imposed by the Congress, found respondents' cause without merit as long ago as November 30, 1926.

Petitioners respectfully submit that upon the facts and upon principle the judgment sought to be reviewed is final within the meaning of section 237 (b) of the Judicial Code.

CONCERNING MISCELLANEOUS ERRORS IN RESPONDENTS' BRIEF.

Respondents in their brief cite, among other cases, *Keogh* v. *C. & N. W. Ry. Co.,* 260 U. S. 156, on the proposition that rates must be applied according to published tariffs. It is not clear, however, what respondents seek to

establish in that regard. The fact is that there were on file tariff schedules which named the rates which respondents are assailing herein. Petitioners filed no cancellation or suspension supplement in respect thereof, since they considered the attempted suspension on the part of the Illinois Commission unlawful and ineffective. As pointed out on pages 4 to 6 and 26 to 29 of the brief in support of petition, petitioners' position was fully sustained by the concurrent orders entered under authority of section 13 (3) of the Interstate Commerce Act by the Interstate Commerce Commission and the Illinois Commerce Commission under date of November 30, 1926, and by the latter Commission's order entered herein under date of January 4, 1933.

In any event, in a situation of the kind here presented compliance with tariff requirements of the state is not controlling. As demonstrated at pages 29 to 41 of petitioners' brief in support of petition herein, the controlling element is the order of the Interstate Commerce Commission as construed and applied by that Commission with the concurrence of the Illinois Commission. As stated in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, obedience was owing while that order was in force.

That the character of this proceeding is misconceived by respondents and by the Supreme Court of Illinois as well, is indicated by the assertion on page 6 of respondents' brief that the controversy "was of a private character between private parties." It is a fundamental principle of regulation of common carriers that all proceedings relating to the collection of freight charges are clothed with a public interest. Petitioners developed this point briefly at pages 42 to 44 of the brief in support of the petition. To the same effect also is *Keogh* v. *C. & N. W. Ry. Co., supra.*

On page 17 of their brief respondents assert that petitioners admitted that the rates charged were not legally applicable on intrastate traffic. The fact is that petitioners

have never at any time admitted that unlawful or illegal rates or charges were at any time applied. On the contrary, they have insisted and now insist that all rates and charges applied on shipments transported by them were strictly in accordance with law.

At page 20 and elsewhere in their brief respondents make the unqualified statement that the question of legality of the charges under consideration was not before the Commissions in the *Chicago Gravel case* and the *Illinois Chicago Gravel case,** the joint proceeding held under authority of section 13 (3) of the Interstate Commerce Act and resulting in the concurrent orders of November 30, 1926. Respondents' statement, however, is wholly unsupported by and it is directly contrary to the record. Relevant portions of the complaint in the *Illinois Chicago Gravel case* are set forth at pages 135 to 146 of the record. This record shows that in paragraphs (7) (R. 137-140) and (8) (R. 140-141) of the complaint complainants set forth much about the suspension order and the alleged legal effect of defendants' declining to follow it. In paragraph (10) (R. 143-144) of the complaint it is specifically asserted that by reason of failure and refusal of defendants fully to comply with the aforesaid suspension order a dispute has arisen as to the proper tariff charges for the intrastate transportation of mineral aggregates in Illinois, resulting in numerous claims for overcharges. In the prayer for relief complainants ask that defendants be required to refund overcharges and to pay reparation as an award of damages (R. 145). Respondents in that complaint specifically requested that a joint hearing be held by the Interstate Commerce Commission and the Illinois Commission (R. 146).

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* As explained on page 3 of petitioners' original brief, reference to the *Chicago Gravel case* means Interstate Commerce Commission Docket No. 17817, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, 118 I. C. C. 633, and *Illinois Chicago Gravel case*, Illinois Commission Docket Nos. 15878, 15539, and 15191, decided in concurrent orders entered November 30, 1926 (Ex. 4 and 6; R. 51-52, 93-134, 147-164).

The implication on page 21 of respondents' brief that the Interstate Commerce Commission in the *Chicago Gravel case* recognized the jurisdiction of the Illinois Commerce Commission in respect of these rates is directly contrary to the fact. As already pointed out, the Interstate Commerce Commission specifically found that as its order in the *Chicago Producers case* * is still outstanding the suspension order of the Illinois Commission did not become effective against petitioners. In two places the Interstate Commerce Commission found that its order in the *Chicago Producers case* was still outstanding (R. 105-124).

It is not apparent what is meant by the assertion on page 21 of respondents' brief that petitioners admitted the jurisdiction of the Illinois Commission but now deny it. The fact is that petitioners have always denied the jurisdiction of the Illinois Commission in respect of these particular rates. In any event, admissions or denials would be of no consequence, since the controlling element is the order of the Interstate Commerce Commission in the *Chicago Producers case,* as construed and applied in the *Chicago Gravel case* and also in the earlier case of *Sand and Gravel between Illinois and Wisconsin Points,* 96 I. C. C. 325 (R. 104).

The assertion on pages 12 and 24 of respondents' brief that petitioners abandoned their plea to the jurisdiction of the Illinois Commission is directly contrary to the record. The fact is that the lack of jurisdiction in the Illinois Commission was asserted in petitioners' amended answer and motion to dismiss (R. 29-32) and a similar motion to dismiss made of record prior to the introduction of testimony (R. 41), and renewed at the conclusion of the hearing (R. 53), and in reply to respondents' petition for rehearing before the Illinois Commission (R. 91).

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* As explained on page 4 of petitioners' original brief, reference to *Chicago Producers case* means Interstate Commerce Commission Docket No. 11490, *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37.

In this connection petitioners invite the attention of the Court to the fact that at no time did respondents take the position before the Illinois Commission that the report and order of the Interstate Commerce Commission in the *Chicago Producers case* was not sufficiently established of record. The provisions of that report and order were admitted in substance by respondents in their brief before the Illinois Commission (R. 66) and in their petition for rehearing before that Commission (R. 89-90). Respondents' contention as to that order was that it was void because not supported by sufficient findings (R. 85, 89).

At pages 39 to 41 of their brief respondents endeavor to create the impression that the Supreme Court of Illinois affirmed the judgment of the Circuit Court setting aside the Commission's order of dismissal because the findings of fact were inadequate. This obviously is not the fact, since under the judgment, as already pointed out, the Illinois Commission is required to award restitution to respondents, there being no discretion to take further evidence or make additional findings of fact.

At page 5 of their brief and elsewhere (pp. 7, 9, 11, 14 and 50) respondents refer to so-called switching charges. What is asserted therein in respect of these charges is wholly irrelevant to this case, since no point was made thereof before the Illinois Commerce Commission. Reference to complainants' brief (R. 63-87) and to their petition for rehearing before the Commission (R. 87-90) shows that none of the alleged switching charges was named and, of course, no argument was presented to the Commission based thereon.

Moreover, the so-called switching charges named by complainants in their brief do not appear representative. The fact is that these so-called charges were arbitraries applying for deliveries on railroads other than the Chicago and North Western or the Milwaukee ranging from $4.00

per car to 2 cents per 100 pounds, and averaged about 30 cents per ton of 2,000 pounds (R. 127). It is apparent that the charge of 30 cents per ton applied for deliveries on other railroads on and after September 10, 1925, made no change in the average charge and was an actual reduction for deliveries to connecting railroads where the charge previous to that date was 40 cents a ton.

At pages 20 and 61 of their brief respondents criticise the rates which the Interstate Commerce Commission found were prescribed in the *Chicago Producers case*, as modified by the general reduction of July 21, 1922. What the Commission found in that case is not open to collateral review at this time. There is nothing wrong with the Commission's arithmetic as respondents suggest. When the general reduction was applied to the rate of 75 cents from Zone II a rate of 70 cents was produced. Deducting a differential of 5 cents resulted in a rate from Zone I of 65 cents (R. 104).

Chicago Fire Brick Co. v .*Chicago & N. W. Ry. Co.*, 123 I. C. C. 164, cited in respondents' brief has no application whatever to the situation here involved. This is conclusively demonstrated by the fact that there was no reference to that case in the record before the Illinois Commission.

CONCLUSION.

In conclusion petitioners again invite the attention of the Court to *Cobbledick* v. *United States, supra,* wherein it was said that "To be effective, judicial administration must not be leaden-footed." Petitioners respectfully submit that this Court should take jurisdiction of this cause, reverse the judgment of the Illinois Supreme Court, and allow the order of the administrative body, the Illinois Commerce Commission, entered under date of January 4, 1933, to remain in effect, thus putting an end to this litigation.

J. N. Davis,
Carson L. Taylor,
Lowell Hastings,
P. F. Gault,
Attorneys for Petitioners.

C. S. Jefferson,
William T. Faricy,
Of Counsel.